Supreme Court, U.S.
FILED

96 690 FEB 3 1997

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No. 96-960

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

NORTH BELLE VERNON BOROUGH; FAYETTE CITY BOROUGH; WASHINGTON TOWNSHIP; FRANK E. MONACK, JR., individually and in his capacity as officer of WASHINGTON TOWNSHIP; OFFICER RAYMOND MOODY, individually and in his capacity as officer for FAYETTE CITY BOROUGH; OFFICER DARHL SNYDER, individually and in his capacity as an officer for NORTH BELLE VERNON BOROUGH,
Petitioners,

v.

FRANCES E. LIVINGSTONE, and JOSEPH A. LIVINGSTONE, her husband,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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21 pp

COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Whether the Third Circuit Court of Appeals holding below, that, after the other public interest reasons offered by the Defendant and the lower court have been rejected or given little weight, an alleged release-dismissal agreement will not be given validity unless it is shown that the prosecutor who had entered into such an agreement had determined that the civil rights claims being waived were marginal or frivolous, was consistent with this Court's decision in Town of Rumery, ?

II. Whether the Court of Appeals holding below, that the party seeking to enforce an oral release/dismissal agreement in a civil action must discharge its burden of proof by clear and convincing evidence, was consistent with this Court's precedent?

(Respondents specifically reject Question II posed by the Petitioners in their Petition for Writ of Certiorari on the grounds that this question is not properly presented to this Court on this record. It is noted that Petitioners do not provide more than a perfunctory argument regarding this question in their Petition. Respondents would argue that the above questions better set forth the questions for review than those posed by Questions I and III in the Petition.)

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COUNTERSTATEMENT OF THE CASE

The first issue raised by Petitioners in this case was decided upon review of the summary judgment in favor of Petitioners at the district court level. The second issue sets forth a standard of proof based upon the oral nature of the release-dismissal agreement under review. The Petitioner's Statement of the Case, however, has been set forth with many inferences in their favor with the omission of much evidence favorable to the Respondents upon which genuine issues of material fact can be found. Therefore, Respondents present the following Counterstatment of the Case:

On or about January 12, 1989, a domestic dispute occurred at the Livingstone's residence at 1397 Fayette Ave. in Belle Vernon, PA. At the residence, the household included the Livingstone's daughter, Carrie Rose (date of birth: 11/15/66) and Carrie's son, the Livingstone's grandson, Nicholas (date of birth: 12-29-87).

As a result of the domestic dispute, Carrie Rose Livingstone left the house with extreme agitation. Shortly thereafter, defendant Officer Monack, defendant Officer Moody and defendant Officer Snyder appeared at the Livingstone residence. They indicated that they were arresting Joseph Livingstone as a result of the domestic altercation involving his daughter. (429a, 430a) Mr Livingstone voluntarily left with the policeman to go to the Washington Township Police Department. However, it is noted that ultimately no charges were filed against Mr. Livingstone.

Subsequently, however, the aforementioned defendant police officers returned to the Livingstone residence. The following events occurred at approximately 11:00 p.m. the night of January 12, 1989 and continuing past midnight into the early morning house of January 13, 1989.

Defendant officer Monack indicated that the police had

come to remove Nicholas, the Livingstone's grandson, from the premises. It is noted that Nicholas, approximately 14 months at the time, had lived his entire life at the Livingstone residence. The child's mother, Livingstone's daughter. Carrie, was unmarried, dependent upon the Livingstones in part for support, and had established the grandparents as custodians of the child in her absence.

The police had no arrest warrant, no search warrant, no custody order, or any other color of authority whatsoever to seize the child. It is noted that after she returned with the police, daughter Carrie did not make any direct requests to the Livingstones at that time for the child. (417a-421a, 423a). Nonetheless, defendant police officers embarked upon an outrageous course of conduct to physically seize the child from the grandparent, Frances Livingstone, through any means, including the utilization of excessive force.

After Joe Livingstone left peacefully with the police, they forcibly reentered the Livingstone residence, without the permission of the owners. (431a)

Mrs. Livingstone retreated to a back bedroom with her grandson, closing a hallway divider and locking the bedroom door. Defendant Officer Monack and defendant Officer Snyder physically broke down the locked bedroom door in order to gain access to the Livingstones. It is noted that Officer Moody provided a pen to Officer Monack to pick the lock of the door initially. (See 438a, 544a, 545a)

After breaking down the door, defendant Officer Monack physically assaulted Frances, striking her several times, causing her to lose consciousness and sustain numerous bruises, lacerations, teeth knocked out and other injuries to her eye, ear and head. She was struck in such a manner as to become pinned and physically helpless, trapped among the furniture in the bedroom. Additionally, Officer Snyder also struck blows. (See 535a-537a; 546a).

At this point, while plaintiff Frances Livingstone was helpless, stunned and trapped, Officer Monack produced a high voltage "stun" gun. He applied it to Mrs. Livingstone, causing burning and temporary paralysis. Officer Snyder aided in holding Mrs. Livingstone down while the stun gun was applied.

While Mrs. Livingstone remained pinned and helpless, defendant Monack said "you want a thrill, I'll give you a thrill." He then applied the stun gun to an area between Mrs. Livingstone's legs, causing internal burns to her body, including the vaginal area. (540a-550a)

Mrs. Livingstone was handcuffed by the officers and, in view of her paralyzed state, was dragged and carried out of the house. During the course of this, she was dropped and banged her head on numerous occasions.

Mrs. Livingstone was dragged outside of the house, early on the morning of January 13th. While handcuffed and paralyzed, she was left to lay among mud puddles, with the temperatures in the 30's, for an extended period of time without protection.

Defendant Officer Moody went through the Livingstone residence, without warrant or any other color of authority, searching through personal papers, drawers and personal effects of the plaintiffs. (432a)

During the actionable conduct of the defendant police officers, all three officers were supportive and encouraging of the actions of the others. They acted in concert, and took no steps to discourage, halt or prevent the actionable conduct of the other officers. It is noted that the police officers were acting pursuant to an established practice among the police departments. A formal intergovernmental agreement had been entered among the municipalities. (See copy of Agreement at joint appendix, 551a).

The officers testified that the practice under the agreement was to follow the instructions of the officer in whose jurisdiction the activity occurred. (437a; 524a-527a). In this instance, Snyder and Moody followed the lead of Officer Monack in accord with this established policy. Further, Washington Township Chief Matthews testified that the actions of the officers taken at the Livingstone residence were in accord with Washington Township policy concerning intervention in custody matters. (424a-428a).

Chief Matthews was called to the scene, where he observed the Livingstone household damage that night. In the presence of the Livingstones he asked Officer Monack whether charges from any party would be filed. At that time Officer Monack did not respond. (543a)

The next day, township officials began to look into the conduct and evidenced a concern that the Livingstones might sue. (530a-533a; 528a-529a)

Subsequently, Frances Livingstone was arrested and charged with disorderly conduct, aggravated assault, terroristic threats, resisting arrest and interference with custody. These charges were filed on or about January 13, 1969. An FBI investigation was opened into the conduct of the police officers. Officer Monack testified that he made repeated contacts with district attorney Alfonse Lepore, questioning whether he might have civil or criminal liability and whether the charges would continue to proceed against Mrs. Livingstone. (461a-466a)

On or about February 12, 1990, this matter came to trial in Fayette County. The first witness against Mrs. Livingstone called by the state was her daughter, Carrie. The officers then testified to events. A demurrer was granted to the charge of interference with custody on the ground that there were no facts showing danger to the child to justify the police conduct. (428a).

Mr. Livingstone and his son testified in defense. The local newspapers carried coverage of the trial. Supervisor Baker appeared at the trial on the morning of the fourth day and was observed speaking to the Chief and Officers, contrary to Baker's assertions. (554a). Mrs. Livingstone was due to testify where she would tell the story of the assault upon her, including the outrageous application of the stun gun, to the jury and the press. That morning negotiations were initiated by the Commonwealth. They offered to drop the charges, but conditioned the request upon a premise that Washington Township and its police officer not be sued. Mrs. Livingstone has consistently maintained that she never agreed not to sue and that, in fact, from the very beginning, had consulted numerous lawyers concerning her rights in this regard. (540a-542a)) Following discussion, an in camera colloquy was conducted before Judge Chichetti whereby Attorney Ceraso suggested the terms of a proposed agreement. It is noted that the proposal did not include North Belle Vernon and Fayette City, although there was an indication that an offer might be extended to them. The record does not show a clear indication that Mrs. Livingstone specifically knew that she was asked to give up the right to sue. Appendix, 112A-115A.

On or about February 15, 1990, the Honorable Richard Chichetti, of the Court of Common Pleas of Fayette County, granted a motion for a judgment of acquittal on behalf of Frances Livingstone, finally terminating the criminal charges against her. The motion was granted during the fourth day of a jury trial against Plaintiff Livingstone. The effect of the motions was to prevent Mrs. Livingstone from publicly testifying about the extent of the injuries she received at the hands of outrageous police conduct at a time when there was public media coverage of the trial. It is noted that her family had already been torn apart by the prosecution of the charges and by the State's insistence that Mrs. Livingstone's daughter publicly testify against her. At no time during the course of the discussions did anybody offer a rationale for dropping the charges on the fourth day of trial, other than the condition that

Mrs. Livingstone be forced to give up her right to sue. At this late state of the proceedings the family had already been publicly torn to pieces.

Mr. and Mrs. Livingstone signed no release. Shortly after the trial, word was sent back to the township that the Livingstones intended to sue. Mrs. Livingstone obtained a new attorney for a review of the circumstances.

Policy-making and/or decision-making officials of the foregoing municipalities, including the chiefs of police and other municipal officials, encouraged the utilization of criminal process to coerce the surrender of civil rights. More particularly, in this instance, the respective chiefs of police were aware of the instant conduct but encouraged and/or ratified the filing and pursuit of the false charges. Chief Matthews of Washington Township was directly present at the scene and discussed the charges and counter-charges with Officer Monack. (461a-466a). Officer Moody himself was the Chief of Police at the time for Fayette City. The North Belle Vernon Police Chief, in accord with established practice, consulted with the Washington Township Police Chief and approved the charges as well. Further, municipal officials, particularly for Washington Township, specifically sought a civil release in exchange for the withdrawal, dismissal, or dropping of the criminal charges. (473a-475a).

Defendant municipalities have pursued a policy, custom, procedure of failing to properly educate, train or otherwise inform their officers of the basic requirements of law concerning the need for search warrants, arrest warrants, court orders or other legal authority for entry into residences and/or forcing child custody transfers. (See trial testimony of Chief Matthews concerning Washington Township policy at 424a-428a, together with the practice under the intergovernmental agreement whereby all municipality back-up officers "follow the lead of the local jurisdiction" (437a, 524a-527a, also trial transcript, 424a-428a)

Defendant municipalites have pursued a custom, policy and/or procedure of failing to provide appropriate training and/or instruction and/or follow-up in the utilization of force, particularly the application of high voltage stun guns to citizens. The police for all the municipalities admitted that they had received absolutely no training concerning stun gun usage, although their respective departments had provided them with stun guns, other than the instructions that came with the device. (434a-436a).

Defendant municipalities encouraged the instant conduct by failing to take any disciplinary action whatsoever. In fact, the instant wrongful conduct has been further ratified by the promotion of defendant Officer Monack to the position of Chief of Police. (433a). As a result of these failures, defendant municipalities have failed to protect the public, including the plaintiffs, as outlined.

This matter was remanded to the district court by a unanimous en banc Third Circuit in Livingstone v. North Belle Vernon Borough, 12 F.3d 1205 (3rd Cir. 1993) (Livingstone I). The remand was for proceedings on the issues concerning the validity of an alleged release-dismissal agreement.

Shortly before trial, plaintiffs sought to defeat the release-dismissal agreement as a matter of law due to its lack of formal ratification. The lower court granted plaintiffs permission to file a motion for summary judgment on this issue. Defendants countered with a cross-motion which was granted regarding all issues involving the validity of the release-dismassal agreement except for the jury issue of whether the release-dismissal agreement was entered into voluntarily, intelligently and deliberately.

At trial, on this narrow issue, the jury found the alleged waiver to be voluntary. Objections were raised to the evidentiary standard, the exclusion of plaintiffs' expert, the

overruling of the attorney-client privilege, and jury instructions concerning the failure of two of the municipalities to participate.

Following the jury verdict, a motion for new trial and/or judgment n.o.v. and/or motion to alter or amend judgment was denied.

The Third Circuit on appeal upheld the trial court's rejection of Respondent's Motion for Summary Judgment concerning the ratification issue but remanded the matter to determine whether the agreement included two of the townships. It also rejected Respondent's arguments that the attorney Ceraso's testimony should not have been permitted, that expert testimony concerning the validity of the underlying civil rights claim should have been permitted, and that the trial transcript of the criminal trial should have been permitted to be introduced before the jury. In view of the present state of the record, while Respondents disagree with these rulings, it would not appear that they were ripe for review by this Court at this time and Respondents expressly do not waive them by failure to raise them at this time.

As noted above, the Third Circuit did remand the matter to the district court for a determination as to whether Respondents North Belle Vernon Borough and Fayette City Borough were included in the agreement. This issue doe not appear to be included as part of Petitioner's Petition for Writ of Certiorari.

The Third Circuit also remanded the matter for a finding as to whether the prosecutor made a determination that the Livingstones' civil rights claims were marginal or frivolous, and whether this was the real reason for his decision to enter into the agreement. The Circuit Court also reversed the finding of the jury concerning the voluntariness issue and remanded it for a decision with the heightened burden of proof of "clear and convincing evidence." These are the two issues that are raised by the Petitioners in their Petition.

REASONS FOR DENYING THE WRIT

A. This Court should not grant certiorari because the Third Circuit's analysis of the alleged release-dismissal agreement was properly conducted in accordance with this Court's ruling in Town of Newton v. Rumery and is not inconsistent with the decisions of other Circuits.

Petitioners first argue that the court should grant certiorari because the Third Circuit's crafting of a rule that release/dismissal agreements are invalid unless the prosecutor correctly determines that the civil rights claims at issue were "marginal or frivolous" conflicts with this Court's ruling in Town of Newton v. Rumery, 480 U.S. 386 (1987) and decisions of other Circuits.

However, this position completely mischaracterizes the Third Circuit's ruling below, which is fully consistent with Rumery, and is not inconsistent with rulings by the other Circuits.

In Rumery, the Supreme Court rejected the Court of Appeals' determination that release/dismissal agreements were per se unenforceable and that such an agreement could be enforceable if the interest in enforcement is outweighed in the circumstances by a public policy harmed by the enforcement of the agreement. Justice O'Connor, who provided the key fifth swing vote in the case, determined that it was the burden of the defendant to prove that a particular release executed in exchange for the dismissal of criminal charges was voluntarily made, not the product of prosecutorial overreaching, and in the public

interest." [1]

The petitioners find that the analysis by the Third Circuit below conflicts with Rumery in that it sets out a "bright line" or per se rule which was rejected in Rumery. On the contrary, however, the Third Circuit has conducted precisely the analysis required in Rumery. The voluntariness of the agreement was analyzed in depth in the opinion. App. 31A-40A. The court also provided a comprehensive analysis of whether it constituted prosecutorial overreaching and was in the public interest.[2] App. 18A-31A. The Third Circuit did determine after this analysis that based upon its earlier decision in Cain v. Darby Borough, 7 F.3d 377 (3d Cir. 1993)(in banc), cert. denied, 510 U.S. 1195 (1994), the case

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1. There was a four justice plurality in Rumery with a concurrence by Justice O'Connor which determined that the release-dismissal was enforceable. Justice O'Connor felt that it was possible that the plurality in Part III-B of its opinion implied that there was a presumption in favor of the enforceability of such agreements and did not join in that section of the opinion.. Rumery, 480 U.S. at 401. The four dissenting Justices favored a presumption against such enforceability. Id., 418. Thus, the controlling thrust of Rumery is based upon the concurring opinion of Justice O'Connor requiring the three-pronged proof set forth in her decision. Those Circuits of Appeals considering the issue have been interpreting Rumery to require this three-pronged analysis. See, e.g., Berry v. Peterson, 887 F.2d 635 (5th Cir. 1989); Coughlen v. Coots, 5 F.3d 970 (6th Cir. 1993); Woods v. Rhodes, 994 F.2d 494 (8th Cir. 1990); Lynch v. City of Alhambra, 880 F.2d 1122 (9th Cir. 1989).

2. The Third Circuit is handling the three pronged analysis as a two pronged analysis in which the prosecutorial misconduct issue is embedded in the larger inquiry as to whether the agreement is in the public interest. App. 18A.

should be remanded to the lower court for a determination as to whether the prosecutor had considered whether the Livingstone's civil rights claims were marginal or frivolous before concluding the agreement.

In both the Livingstone case below and in Cain, the Third Circuit first analyzed the reasons offered by the defendants and the lower courts concerning the weight given to the various public interests involved. In Livingstone, the court rejected the three reasons offered by the lower court. It gave little weight to the concept that the public interest in further litigation is outweighed by the cost of litigation, since that could be asserted in virtually any case. pp. 21A-22A. Based upon the Rumery Court's rejection of per se rules, it found that such a blanket exception could violate Rumery and required close scrutiny. In Cain, the Third Circuit similarly had rejected the government's blanket assertion that there was a public interest in avoiding "the needless litigation, the oftimes frivolous actions that are brought and to resolve the entire matter at the time of the ARD hearing in an amicable manner." Cain, 7 F.3d at 383. The County below had been requiring all individuals to sign a release/dismissal agreement before being permitted to enter their alternative disposition program. The Third Circuit then remanded the case for a case-by-case determination as to whether the released civil rights claims appeared to be marginal or frivolous at the time the agreement was made, and whether the prosecutor was in fact motivated by that reason.[3]

In footnote 16, in Livingstone, the court made it clear that it was not falling into the blanket or per se rule trap rejected by Rumery. p. 23A. It specifically determined that an exception to the requirement that the prosecutor consider whether the released civil rights claims were marginal or frivolous existed if there were other strong public interests

3. The petitioners here are actually essentially attacking the Third Circuit' decision and ruling in Cain, a case for which this Court has already denied certiorari. 510 U.S. 1195.

which supported the agreement, such as the one that had been present in Rumery. Thus, the frivolous and marginal determination is only required where such other strong public interests have not been identified or demonstrated. The Third Circuit in Livingstone below had merely correctly found that the three public interest reasons asserted by the defendants and the lower court below were not persuasive, and this determination, concerning whether the civil rights claims were marginal or frivolous, would have to be made in order to finally decide the enforceability of the agreement.

Therefore, it is clear that the Third Circuit's decision below was completely consistent with Rumery, and justly, fairly and correctly applied the analysis set out by the Supreme Court in that case, albeit in a way disappointing to the petitioners.

Petitioners also argue that the Third Circuit's decision was inconsistent with that of other Circuits. They cite the Fifth Circuit's decision in Berry v. Peterson, 887 F.2d 635 (5th Cir. 1989), and the Sixth Circuit's decision in Hill v. City of Cleveland, 12 F.3d 575 (6th Cir. 1993) as examples.

However, in Berry, the Fifth Circuit was analyzing a plea agreement in which a prisoner who had been burned by a mattress fire had allegedly agreed to release his civil rights claims regarding the burns in return for dropping of an arson charge and being granted probation on other charges pending against him. Although it involved a plea agreement in which other charges were not dropped,[4] the court there did analyze the matter under Rumery and found that there were strong public interests in favor of the agreement. Unlike in Livingstone, in Berry, the Fifth Circuit determined that the individual still could maintain a claim against the mattress manufacturer and that the

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4. The majority in Rumery distinguished plea bargains from release/dismissal agreements, and applied its analysis to the latter. See footnote 3, Rumery, 480 U.S. at 393.

public was protected in that the charges were not all dismissed, factors not present in Livingstone.

In Hill, the Sixth Circuit also analyzed a release-dismissal agreement under the Rumery analysis. It determined that there was no evidence of prosecutorial overreaching based upon the police officer's affidavit that he did not know of the threat of a civil rights action against him when he preferred the charges, that the written and signed agreement had been judicially approved, and that the conflicting stories regarding the incident made the civil rights action uncertain. Thus, the court clearly did find sufficiently strong public interests in support of the agreement to find it enforceable, interests different from those asserted in Livingstone.

Additionally, this is not the appropriate time for this Court to take on this case. The issues have not yet been completely decided since the case was remanded by the Court of Appeals to the lower court for further action. There is still to be a final determination of whether in fact the prosecutor considered the civil rights claims to be marginal or frivolous, whether the agreement included the other municipalities, and whether voluntariness could be shown by clear and convincing evidence. The Supreme Court's examination, if required, would be much more appropriate and meaningful after such matters have been completely decided. Therefore, the Court should not grant certiorari on this issue.

B. The Third Circuit's application of a clear and convincing evidence burden of proof upon the Petitioners is consistent with this Court's precedent.

The petitioners also request this Court to grant certiorari in order to decide the correctness of the Third Circuit's requirement that voluntariness of an oral release-dismissal agreement be proven by clear and convincing evidence.

Petitioners assert that this burden of proof conflicts with this Court's earlier precedents.

This Court has previously held that a standard of proof greater that one of the preponderance of evidence can be applied in civil cases in which "particularly important individual interests or rights are at stake." Herman & MacLean v. Huddleston, 459 U.S. 375, 389, 390 (1983). The Third Circuit determined that the individual's right to obtain redress for possible violations of constitutional rights was such an important individual interest or right, particularly where the alleged agreement to waive this right was oral and not in writing. As noted by the Third Circuit, the importance of not allowing release-dismissal agreements to encroach on this right was recognized by all nine justices in Rumery.

The right for redress for violations of constitutional rights is at least as important as the rights at stake in other cases where this Court found a clear and convincing evidence burden of proof to be warranted. Santosky v. Kramer, 455 U.S. 745 (1982)(termination of parental rights); Addington v. Texas, 441 U.S. 418 (1979)(involuntary commitment procedures); Woodby v. INS, 385 U.S. 276 (1966)(deportation proceedings).

Petitioners, however, cite Colorado v. Connelly, 479 U.S. 157 (1986) as an example of a case in which a determination of whether the defendant has waived constitutional rights merely requires proof by the preponderance of the evidence. This, of course, is based upon the wholly different criminal context from the civil context here. The Court in that case made it clear that its rejection of a higher standard was that

> "it is very doubtful that escalating the prosecution's burden of proof in ... suppression hearings would be sufficiently productive ... to outweigh the public interest in placing probative evidence before juries for the purpose of arriving at truthful decisions about guilt or innocence."

Id. 390. This strong countervailing public interest in having relevant evidence go before the fact finders in criminal matters is not present in this case.

The Third Circuit's requirement for clear and convincing evidence is wholly consistent with Rumery. In discussing the evidence, Justice O'Connor in her pivotal concurring opinion stated that the evidence that Rumery voluntarily entered the agreement was convincing. 480 U.S. at 403. The opinion of the Court confirmed that it was clear that Rumery voluntarily entered into the agreement. Id. 397, 398. Thus the Third Circuit's decision is entirely consistent with this Court's precedents and the grant of a writ of certiorari is not warranted.

CONCLUSION

Essentially, the Third Circuit, in finding a heightened burden of proof, and requiring a prosecutor under certain circumstances to determine whether an underlying civil rights claim is marginal or frivolous, is attempting to apply workable standards to an inherently difficult process.

At its core, an attack on the release-dismissal agreement under Rumery will almost always require some form of challenge to the ethical integrity of the prosecutor involved. Trial courts will be reluctant to draw the conclusion that a particular prosecutor may have committed ethical breaches associated with coercing the extinguishment of otherwise protected civil rights by means of the threat of criminal prosecution. Prosecutors will be put on the defensive with their very careers at stake. The public is poorly served by extended litigation of such a magnified threat to its public prosecutors. On the other hand, it appears clearly not the intent of this Court in Rumery to ignore the coercive effects of a civil release in the criminal prosecution context.

The test set forward by the Third Circuit, consistent with

the dictates of Rumery, allows trial courts to quickly and efficiently cut to the root of whether the prosecution tactics were unfair without necessitating a prolonged hearing into the personal ethics of the prosecutor. If the underlying civil rights claims are demonstrably not frivolous to the satisfaction of the trial judge by means of pretrial review, then the matter goes to the jury with the appropriate high burden upon the government.

This is a fair balance of the competing interests in the matter. In any event, the Court is encouraged to permit experience to be gathered under the Third Circuit's approach to ascertain whether these practical tests achieve satisfactory results.

In view of the foregoing, therefore, since the Third Circuit's decision is consistent with the precedent of this Court, does not conflict with decisions of other Circuit Courts of Appeal, is justand rational, and does not constitute such a departure from the accepted and usual course of judicial proceedings as to call for this Court's supervisory power, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the forgoing Brief in Opposition to Petition for a Writ of Certiorari was served by first-class mail on February 3, 1997 on the following:

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